

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kube Sherron Jones (Applicant)

AND Baycorp Advantage (NZ) Ltd

REPRESENTATIVES Margaret Lewis, Counsel for Applicant
Richard McIlraith and Lewis Turner, Counsel for Respondent

MEMBER OF AUTHORITY Dzintra King

INVESTIGATION MEETING 11 December 2003
12 December 2003
15 December 2003

SUBMISSIONS RECEIVED 15 November, 10 December from Applicant
7 December from Respondent

DATE OF DETERMINATION 10 January 2005

DETERMINATION OF THE AUTHORITY

Ms Kube Jones, the applicant, claims that she has been unjustifiably disadvantaged and constructively dismissed by the respondent, Baycorp Advantage (N.Z.) Limited ("Baycorp"). She also claims that the respondent misrepresented the position which it offered to her. The respondent denies all the claims.

This was a difficult case for both sides. It is a great pity that it could not be resolved at mediation. I would like to thank all the participants for the manner in which they conducted themselves in often emotionally fraught circumstances. I would also like to say that it is my experience that witnesses rarely deliberately tell lies. Differences in perspective, perception and recollection are usually the result of how people genuinely remember particular incidents. The emotion attached to certain incidents will inevitably colour recollections of those incidents. It is also normal for people to want to paint themselves in the best possible light. This is not reprehensible; it is simply human. I make these preliminary remarks because in the course of this determination I, as an outsider to the events that culminated in an Authority hearing, have to make judgements about whose recollection and whose perception is, on the balance of probabilities, given all the evidence before me, the more likely to be accurate.

Baycorp had previously employed a Communications Assistant, Ms Megan Sherrin, who left Baycorp in March 2001. A decision was made to create a position of Communications Manager. This was the position in which Ms Jones was employed by Baycorp. Prior to being appointed to the position she had two interviews, the second interview being arranged because Mr Paul Stewart,

Baycorp's Manager, Organisational Effectiveness and Communications, was concerned that aspects of the position might be too mundane and boring for someone of Ms Jones's experience. Ms Jones was understandably excited about moving back into the communications area. As a result she chose to take the position despite the fact that many aspects of the job were at a quite basic level. She took up the position on 2 July 2001 and says that she was constructively dismissed on 25 October 2001, although her last day at work was 28 September 2001.

At the time Ms Jones took up her employment the respondent was in the process of finalising negotiations for a merger with an Australian company, Data Advantage Ltd, and the announcement was planned for 7 August 2001. The period leading to the merger announcement was a busy and stressful one for all staff.

Ms Jones said she felt that Mr Stewart undermined her authority and that his behaviour was intimidating and demeaning. The one clear instance of improper behaviour by Mr Stewart took place in the week of 23 July. Mr Stewart was dissatisfied with some work done by Ms Jones and yelled at her to come into his office. A staff member who witnessed this said to Ms Jones that Mr Stewart should not have behaved in that manner towards her. Ms Jones said she felt fearful and humiliated. She asked Mr Stewart for an apology at a later stage but he initially denied it and then said he did not think it significant. Quite understandably, it was significant to Ms Jones and an acknowledgement and an apology would have been sensible and sensitive responses.

However, Ms Jones' emails to family and friends indicate that while she missed her family in the United States she liked the job. On 10 August she sent an email saying "I'm proud to be who I am, what I am and where I am professionally"; and on 13 August she emailed saying "last week was one of the most exciting of my professional career."

Ms Jones was, pursuant to her job description, given the task of producing the annual report. Ms Jones gave evidence that she was surprised to be given this task. Upon considering the evidence I think that Ms Jones felt it was below her level of ability to be asked to write it. She perceived the position to be of a much higher level than it actually was. It was an operational rather than a strategic position. Ms Jones had not worked in a subordinate position for fifteen years.

Ms Jones claims that Mr Stewart would not meet with her or provide her with assistance. An email dated 3 September from Ms Jones to Mr Stewart acknowledges that there had been meetings and that information had been provided. Ms Jones said she had a wealth of data for the annual report and cancelled a meeting scheduled for that day, the purpose of which was to discuss the annual report. In reality, Ms Jones was having problems with the annual report and did not want to openly acknowledge this to Mr Stewart. During the hearing Ms Jones accepted that she had difficulties writing the report. I can understand that a person who has seen herself as highly competent would find it difficult to acknowledge problems with a mundane task. I can also understand that Ms Jones felt it necessary to convey a confident, well-performing image of herself to Mr Stewart. However, Mr Stewart could not know that the confident manner was a façade.

The following day, 4 September, she emailed a draft which was an amalgam of the previous year's report. Mr Stewart was not satisfied with this and was becoming concerned that the report would not be completed on time and arranged for Ms Sherrin, who had worked on previous annual reports, to be brought in to assist. While Ms Jones was relieved that she would get help with the report, when Ms Sherrin arrived she felt that Mr Stewart gave Ms Sherrin the time he had not given to her. Ms Jones felt excluded. I note that there is an email from Ms Sherrin in which she comments on Ms Jones' capabilities and expresses surprise at Ms Jones' inability to write the report. This surprise was shared by Mr Stewart and, given her work history and qualifications, it also surprised me.

On 21 August an issue arose over a matter relating to Ms Jones' insurance and she also had concerns about her mother's health. On 30 August she emailed saying "My mom's condition over the last 2 weeks have [sic] been as distracting as possible". She also wrote: "It's been a mad, wonderful ride with Baycorp, especially the merger, and the ongoing activities are just as exciting." She felt mortified that the insurance related issue had been raised with her and when a similar concern emerged again later formed the view that Mr Stewart was harassing her about it. The matters constituted legitimate concerns which the respondent was entitled to raise.

Between 10 and 12 September there were meetings between Mr Stewart and Ms Jones regarding her performance, the insurance issue and her personal situation. On 10 September Mr Stewart emailed Ms Jones as follows:

It is clear that we have some issues that need to be worked through in terms of your performance. As discussed, while the Communications Manager role is an important, senior and, at times, challenging position I believe that you should have the capacity to perform effectively in the role based on your previous experience. I want to make it work for both of us and I would like you to think carefully about the issues we discussed and what you personally can do in working with me to address them.

I accept that it has been a difficult time for you to come into Baycorp; in the midst of the merger communications strategy. With this in mind, and while I have not been able to spend quite as much personal time with you and [sic] I might have otherwise, I have been trying to give you every assistance I can. For example, I have allowed a number of tasks under your role ...to be reallocated to others. ... Even so, on a number of occasions you, or we, have still failed to meet the objectives required.

Events of this Monday particularly concerned me. We agreed a clear set of actions in the morning meeting with Megan, you and I which were clearly not followed. This has caused problems because I was unable to assist with developing the Annual report as I had hoped by allocating tasks to myself and Megan. Kube, because so much of our work is time critical, it is important to deliver to agreed timelines on tasks of all sizes. If under certain circumstances that is not possible, the issue must be raised as soon as possible so that we can reorganise the work.

Mr Stewart went on to suggest counselling and Ms Jones accepted this offer. Mr Stewart also commented that when Ms Jones returned to work that they would need to meet to discuss a performance counselling process. He said:

I do need to advise you that should your performance not improve then further action may be taken, up to and including dismissal.

Ms Jones said she was threatened with dismissal. In fact, Ms Jones offered to resign, an offer which Mr Stewart rejected. Instead, he put in place the performance monitoring process. While it is possible to read the comment quoted above as a threat of dismissal I think it is more fairly and reasonably read as a warning of the possible consequences should there be a failure to improve.

Ms Jones' response was to email on 12 September saying:

I accept your review of my performance since I joined the company on July 1, and appreciate the opportunity to reassert myself in the role of Communications manager. I feel that my initial few weeks with the company, while quite heady, I did perform well under

pressure, and was complimented by quite a few of my colleagues. It has been very difficult to see my performance slip down in full view of my colleagues, and I look forward to regaining their professional respect.

...

There is no need to address your letter point by point...it is mostly valid, I find little to dispute.

She was given time off work and the counselling started on 17 September. On 24 September Ms Jones returned to work and sent a cheerful email asking for KPIs and saying she valued Mr Stewart's leadership. There was a meeting on 24 September. KPIs and KBIs were provided as were tasks and agreed deadlines. During the hearing Ms Jones said these were not agreed. I favour the view that they were agreed and that Ms Jones' contention that they were not agreed rests on her feeling that she had no choice but to agree because of an overwhelming need to placate Mr Stewart. In fact, Ms Jones' written brief says as much. At para. 98 she stated "Although very concerned about the deadlines, in view of his attitude, I simply accepted the schedule and decided to do my best." I understand that Ms Jones was worried about her performance and that she felt intimidated by Mr Stewart and therefore took a placatory, submissive approach. While to do so is understandable, unfortunately Mr Stewart had no way of knowing that she was uncomfortable with the proposed schedules.

In an email summarising the meeting Mr Stewart said:

You have been provided with detailed KPIs and KBIs, against which your performance will be monitored. I have asked you to review those and self-appraise your performance thus far, against those. I have also asked you to develop a plan with specific points that will address the shortfalls. We will review this next Monday afternoon (1st October).

Mr Stewart said that at the meeting they worked their way through the schedule of weekly tasks that he had prepared. They discussed whether they would be able to be achieved and he encouraged her to go away and consider them and come back to him if she wanted any changes. He also asked her to consider whether two months was a satisfactory period for improvement to take place. She came back within five minutes and said it was acceptable.

A couple of days later, on 26 September Mr Stewart had a discussion with Ms Jones regarding the fact that he and Mr McLaughlin, the Managing Director, had decided not to pay her a bonus relating to the merger project. He told her privately before she became aware that other staff had received bonuses and she thanked him for telling her. He told her that her contribution during the merger process had been within the terms of her job description and that she had not been long with the company; and that her contribution had been noted and that it would be taken into account in her six month review in relation to the at-risk component of her remuneration. Ms Jones was, as anyone would be, nonetheless distressed about this and felt it was unfair. She thought that Mr Stewart was "deliberately baiting" her. Ms Jones' performance was in question and she undoubtedly felt very vulnerable. Mr Stewart did nothing untoward either in telling her or in the manner in which he conveyed the information. It would have more distressing had she become of the bonuses through fellow staff members.

Unfortunately, Ms Jones failed to complete most of the agreed tasks. Consequently, Mr Stewart asked to speak to Ms Jones on 27 September. He told her she had completed just one of the agreed tasks and that it was probably not realistic to expect that the remainder would be completed by the following day, the Friday. He suggested that she take the schedule away and consider what she

could realistically complete by the end of the week. She returned shortly thereafter and said she could do everything and that she would work late to do it.

Mr Stewart considered, correctly, that Ms Jones was not being realistic. The next morning he met with Ms Debbie Piggott, the HR Manager, and asked her advice. Her suggestion was that Ms Jones be told she could have a representative at the Monday meeting. Mr Stewart subsequently met with Ms Jones with the intention of discussing his concerns about what had happened during the week and also intending to suggest that she bring a support person to the Monday meeting. He had prepared a letter which he wanted to give her. Mr Stewart gave evidence that had he realised that Ms Jones was very stressed and vulnerable he would not have proceeded with the meeting. I do not doubt this. Ms Jones had unfortunately given the clear impression that she was well and able to deal with matters. Had she told Mr Stewart that she could not cope with the timetable I am sure it would have been reorganised. I can comprehend Ms Jones' reasons for wanting to appear capable but Mr Stewart could not know that she had doubts and concerns; he could only act upon the way she presented herself and what she said rather than what she felt but did not express.

Mr Stewart said that as soon as he raised the failure to meet the deadlines Ms Jones refused to accept that there was a problem. When he did not accept the excuses she gave he said she became very angry and shouted at him, including saying "You can fuck your job" before leaving the room. Ms Jones said Mr Stewart yelled at her and slammed his fist on the desk saying "Damn it Kube, when are you going to take responsibility for your own performance?" Mr Stewart accepted that he said that but denied yelling or slamming his fist. Ms Jones said she felt herself start to shake and she felt afraid of his anger and felt physically threatened. She said she was unable to cope with any more abuse from him and so she jumped up and left the office.

This was clearly an upsetting situation for both people. Ms Jones had previous experience of Mr Stewart being angry with her. I am referring to the July incident when he shouted at her. She felt that he had continually intimidated and demeaned her by raising issues such as the insurance matter and the bonus. Her ability to do her job had also been called into question. Ms Jones was in a highly emotional state and I think it more likely than not that she did say he could fuck his job. Mr Stewart had become very frustrated in his dealings with Ms Jones.

Ms Jones went back into the office shortly thereafter. She has assumed Mr Stewart would have left to catch a plane. He said she seemed relatively calm and he asked her to continue the meeting. He said that as soon as he started to speak Ms Jones raised her voice and became highly emotional and abusive. At one stage she shouted "Sack me, go on, sack me!". Ms Jones said she asked him why he didn't just fire her and that he replied that he was in no position to fire her and why didn't she just quit. Mr Stewart denied making the remark about quitting and I accept that is correct. Mr Stewart said he then became angry and also raised his voice. Mr Stewart lost his temper, which fact he acknowledged in his evidence. Ms Jones said she became very afraid and picked up her coat and purse and that he then shouted at her that she was not going to walk out on him again. He raised his fist and she thought he would hit her. He pushed the door closed and would not let her leave. Mr Stewart agreed that he had his hand on the door. I do not think Mr Stewart raised his fist or had any intention of hitting Ms Jones.

A number of people became concerned about what was happening in Mr Stewart's office. Attempts were made to contact Ms Piggott. Ultimately, matters were brought to a conclusion when Ms Gibson, Baycorp's legal counsel, intervened. Ms Gibson said Mr Stewart was initially reluctant to let her into the room and told her he was conducting a "performance counselling session."

It is apparent that both people were angry and distressed. Both of them swore at each other. It was not right of Mr Stewart to attempt to prevent Ms Jones from leaving the room. Both people lost

their tempers and shouted. Ms Jones was very distressed and went to see her counsellor. She then went home.

The letter Mr Stewart had prepared to give to Ms Jones was amended by Ms Piggott to include a paragraph relating to the incident on that day. The letter said:

Dear Kube

As was raised with you earlier today, you are invited to attend a meeting on Monday 1 October at 3.00pm to held [sic] in the meeting room on Level 5 with Debbie Piggott and myself to discuss your performance in the role of Communication Manager, and your apparent inability to meet agreed deadlines as set out in the action plan agreed between us on Monday.

As we have previously discussed, it is critical that as a senior manager, your performance improves to a level that is acceptable for the role you perform.

In addition to the above issue, and as a result of the impromptu meeting this afternoon, we will also be discussing your behaviour at that meeting which I found to be totally unacceptable from any employee, particularly a manager of your seniority.

You should be aware that the meeting is to be part of an investigation into not only an unacceptable performance issue, but now also possible serious misconduct, and that your employment could be adversely affected by any result of the meeting, including the possibility of dismissal. Consequently, you are entitled to have a witness, support person or representative at the meeting.

You will not be required to return to the workplace or to perform any work duties until the meeting.

Yours sincerely

*Paul Stewart
Director
Organisational Effectiveness and Communications
Baycorp Limited*

Sometime later that day, Ms Piggott and a co-employee of Ms Jones' arrived at her home. This was said to have been occasioned by concern for Ms Jones and while I would not totally discount this the more cogent reason was to deliver a letter to Ms Jones telling her she was to attend a disciplinary meeting on the following Monday. Her security access was cancelled.

Dr Neill said that when Ms Piggott and Mr. Costello came to the house he went to talk to them. They indicated they were concerned about Ms Jones. Acting on that, he invited them in. It then became apparent they had come to deliver notice of disciplinary proceedings. Dr Neill said he was outraged by the intrusion and the gross mendacity with which it had been effected. Mr. Costello and Ms Piggott deny this. Dr Neill's version of events has psychological verisimilitude. Given the emotional state of his wife he is unlikely to have invited people into his home had they indicated they were intent on discussing disciplinary matters.

Looking at the letter, I am startled by the fact that Mr Stewart, who was the other person involved in the altercation, appears to have been the person who was to investigate the very matter in which he

had been involved. I was told in the hearing that people had been spoken to about the events of 28 September and it was clear to me that a view had been formed that Mr Stewart was the innocent party. Concomitantly, it seems clear that a presumption of guilt vis a vis Ms Jones had been made. Mr Stewart should not have been put forward as the investigator in a matter which involved him. Any such proceedings, had they taken place, could not have been fair.

I am also surprised by the co-employee's involvement in the matter. He was not a friend of Ms Jones and his presence at her home was not appropriate. While the employer was entitled to hold a disciplinary meeting I do wonder at the wisdom of company representatives going to an employee's home, particularly given the fact that Ms Jones' distress had been readily apparent to those who witnessed the incident. I do not think sense and sensitivity prevailed.

Ms Jones saw a medical practitioner and was given a medical certificate to cover her until 14 October.

Not content to leave well alone, a further visit was made by Ms Piggott and the same employee some days later, while Ms Jones was on sick leave, to recover a cellphone, despite concerns having been raised by Ms Lewis that the phone was for private as well as work use. Ms Piggott noted "Kube walked off before we had a chance to speak I found her behaviour to be unacceptable." Ms Jones had instructed a lawyer and it would have been better if such dealings had been conducted through her.

Further subsequent actions of Baycorp also leave something to be desired. Ms Lewis made a request for copy of Ms Jones' email files for September. This was initially agreed but then refused. Ms Piggott refused access to documents on the grounds that "a party is not entitled to discovery of documents for the purposes of mediation". The Employment Relations Act 2000 places primacy upon mediation and to obstruct the possibility of resolution by denying access to documents upon a technicality is not accordance with the purpose of the legislation. Despite the fact that the respondent knew that a personal grievance had been filed and had gone to mediation and that computer records had been requested it chose to delete the records. The respondent's solicitors advised "Regrettably we are advised that in accordance with standard company policy, Ms Jones' hard drive was deleted approximately eight weeks after the end of her employment with the company." I appreciate that after the resignation no further action was taken by the applicant until December 2002. However, to fail to ensure that the automatic deletion of records did not take place a mere eight weeks after the employment terminated without at least checking with Ms Lewis is unacceptable. It resulted in substantial delays to the proceedings as a computer forensics company had to be employed to attempt to recover deleted records.

Disadvantage

Ms Lewis for the applicant has claimed that there have been breaches of a number of express and implied terms and that Ms Jones has suffered a disadvantage.

The first allegation is that she was required to work in a more junior position on a task by task basis. Ms Jones was at times required to work on a task by task basis. The tasks that she was asked to do were within the terms of her job description. Furthermore, the employment agreement permits the employer to vary the duties. It says:

Variation of Duties: The Company may require you to work in another section or company within the group or vary the duties you are required to perform.

There was no improper reason for the assignment of work on a task by task basis.

It is claimed that details of her duties were not provided until 24 September. Ms Jones did have details of her duties although the KPIs and KBIs were not provided until that date. Ms Jones did have a job description and it was discussed with her at the interviews.

Ms Jones was shouted at angrily and in a demeaning manner in front of other staff in July. This was certainly not desirable or proper behaviour but on its own does not constitute a disadvantage.

Ms Jones was denied a bonus. However, there was a rationale for this and it was a discretionary matter. I do not find that the bonus was denied for punitive or any other improper reason.

It is claimed that Mr Stewart insisted on a disciplinary meeting on 28 September when Ms Jones was known to be vulnerable and then insisted on a second meeting. An employer is entitled to conduct disciplinary proceedings. However, neither of the unfortunate meetings on 28 September were disciplinary meetings. The intention was to give notice of possible disciplinary proceedings.

It is claimed that two unlawful suspensions took place. The Employment Agreement has a section relating to investigation procedures. It states:

*(Note: If the initial examination indicates that misconduct may have occurred the employee(s) involved **may** be stood down whilst the matter is investigated properly. During the period of stand down the employee(s) will continue to be paid and be required to be available for discussion. A **stand down is not a disciplinary measure**).*

The first claimed illegal suspension was on 28 October. I do not think it would have been in anybody's interests for Ms Jones to have returned to work that day. The employer was setting an investigation in train. In the circumstances it was reasonable for Ms Jones to be told not to return to work until the meeting.

The next suspension relates to the period after Ms Jones' medical certificate had expired but prior to the mediation taking place. Despite the denials of the respondent a suspension did take place during this time. Again, given the circumstances and the emotional lability, it was sensible for Ms Jones not to be at work.

It is alleged that an unsafe workplace was maintained leading to OOS. There was insufficient evidence to lead me to conclude that this was the case.

It is claimed that the respondent maintained an unsafe and stressful work environment in the week of 24 to 28 September and that it failed to avoid the risk of psychological harm to Ms Jones. I accept that Ms Jones found her work environment and her work stressful but I have reached the conclusion that Ms Jones was not in an unsafe work environment.

The applicant claims that the instituting of disciplinary procedures upon her return from counselling was unlawful and punitive and insensitive. I can see nothing unlawful about it. An employer is entitled to deal with performance issues. Certainly there are different ways and means of doing so. Ms Jones presented herself upon her return from counselling as being capable and well. Mr Stewart was entitled to take this at face value.

I have given careful consideration as to whether the events that took place during Ms Jones' short period of employment could be said to have constituted a disadvantage. Upon reflection, I do not think Ms Jones can be said to have been disadvantaged.

Misrepresentation

I do not accept that Baycorp misrepresented the position to Ms Jones. The position as detailed in the job specification was accurate. There was a Communications Manager's position but Ms Jones did not undertake some of the duties for a variety of reasons. Some of these had to do with quite legitimate concerns, for example, shareholder issues. Ms Jones was frustrated because she felt she was not being allowed to work at her skill level and was being given menial tasks, even though these fell within her schedule of duties. I think Ms Jones wanted the job to be at a higher level than it actually was and desire prevailed over actuality. She was not, for example, responsible for formulating strategy but for implementing it.

Constructive Dismissal

The applicant believes that she has been constructively dismissed. A constructive dismissal occurs when an employee is faced with a situation in which she has no option other than to resign. This may be because, as set out in *Auckland Shop Employees IUOW v Woolworths* [1985] 2 NZLR 372:

- she is given an ultimatum either to resign or be dismissed;
- the employer has followed a course of conduct with the intention of inducing an employee to resign;
- a breach of duty by the employer causes an employee to resign.

The applicant relies on two of these grounds: that the employer followed a course of conduct with the dominant and deliberate purpose of coercing an employee to resign and that there was a breach of duty. The employer did not follow a course of conduct with the dominant and deliberate purpose of coercing a worker to resign.

Ms Jones had formed a view that Mr Stewart set out to demean and embarrass her. I accept that she found him intimidating but I cannot agree with Ms Jones' view that Mr Stewart set out to persecute her or demean her or upset her. Mr Stewart had no reason to do any of those things. He did behave badly twice: the yelling incident and the second meeting on 28 September. However, Ms Jones' behaviour at that second meeting was also hardly exemplary. He did not set out to undermine her or to devalue her. Mr Stewart was quite genuine in his view that Ms Jones needed to improve her performance and he found dealing with her frustrating. Ms Jones was understandably upset that she had difficulties writing the annual report and that her performance was being questioned. Ms Jones was not dismissed.

If the parties are unable to resolve the issue of costs they should try to agree upon a timetable for the filing of memoranda; if this is not possible, I will set a timetable.